

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EDWARD L. SIMS, II,

Appellee/Petitioner Below,

vs.//

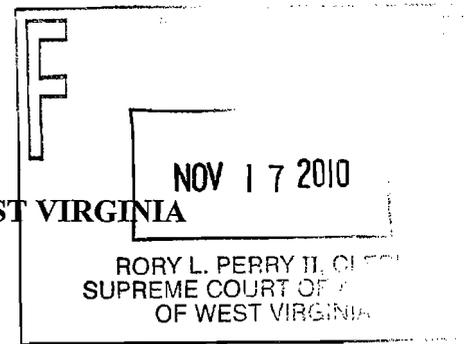
NO. 35673

JOE MILLER, Commissioner of the
West Virginia Division of Motor Vehicles,

Appellant/Respondent Below.

**RESPONSE OF APPELLEE/PETITIONER BELOW, EDWARD L. SIMS, II,
TO BRIEF OF APPELLANT/RESPONDENT BELOW**

Comes now the Appellee, Edward L. Sims, II, by counsel, Gregory W. Sproles, and submits this Response to Brief of Appellant in accordance with the order of the Court. Appellee seeks this Honorable Court to uphold an order entered on December 30, 2009, by the Honorable Gary L. Johnson, Judge of the Circuit Court of Nicholas County, in an administrative appeal styled *Edward L. Sims, II v. Joe E. Miller, (formerly Joseph J. Cicchirilli) Commissioner, Commissioner of the West Virginia Division of Motor Vehicles, Civil Action No. 08-P-51*. Through its Order, the Circuit Court reversed an administrative driver's license revocation order entered by the Division by which the Appellee's privilege to drive was revoked. The circuit court's order was correct as a matter of law because: (1) it correctly stated the requirements for administration of the result of an Intoximeter test; (2) it correctly stated the requirements for admission of the results of a blood test; (3) it was correct in finding that the testimonies of the officer and the driver were not reconciled; (4) it was correct in finding that the Commissioner (Appellant) was required to give substantial weight to the result of the criminal matter; and (5) it was correct in finding that the failure of the Arresting Officer to introduce a video tape of the Respondent raises an adverse inference against the testimony of the



Arresting Officer and that it was error for the Commissioner (Appellant) to rely upon the results of any blood tests because of the lack of foundation for the introduction of such tests.

I. TYPE OF PROCEEDING AND NATURE OF THE RULING BELOW

The Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles, hereinafter referred to as "Petitioner", appeals from the *Order Reversing Commissioner's Final Order and Reinstating Petitioner's Drivers' License and Driving Privileges*, hereinafter referred to as "Order", entered on December 30, 2009 by the Honorable Gary L. Johnson, Judge of the Circuit Court of Nicholas County, West Virginia. The Order resulted from the Petition for Judicial Review by Edward L. Sims, II, hereinafter referred to as "Respondent", from the Remand Final Order of the Petitioner, with an effective date of August 3, 2009, which revoked the Petitioner's drivers' license for driving under the influence of alcohol. This Remand Final Order was entered as a result of an earlier Order, entered by Judge Johnson on March 24, 2009, based upon an agreement between the parties that the Petitioner's Final Order, with an effective date of November 10, 2009 did not comply with the mandates of *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E. 2d 518 (1996) and *Choma v. West Virginia DMV*, 210 W. Va. 256, 667 S.E. 2d 310 (2001). In this Order, Judge Johnson specifically directed the Petitioner to review the evidence presented and enter a new Order which complied with *Muscatel and Choma, supra*.

On December 7, 2009, a hearing was held on the Respondent's Petition for Judicial Review regarding the Petitioner's Remand Final Order. Based upon the entire record, Judge Johnson entered the Order which reversed the Remand Final Order of the Petitioner and reinstated the Respondent's drivers license. The Respondent contends that Judge Johnson was correct and, in any event not clearly wrong, in finding that (i) the secondary chemical test administered to the Respondent was not admissible at the administrative hearing; (ii) the result of a blood test administered to the Respondent

was not properly admissible at the administrative hearing; (iii) the Remand Final Order did not provide a proper analysis of the evidence presented as required by Muscatell v. Cline, 196 W.Va. 588, 474 S.E. 2d 518 (1996) and did not give substantial weight to the dismissal of the criminal charge against the Respondent of driving under the influence of alcohol as required by Choma v. West Virginia DMV, 210 W. Va. 256, 667 S.E. 2d 310 (2001); (iv) although there was evidence that the Respondent had consumed alcohol there was no evidence presented regarding when the Respondent consumed alcohol or the amount he consumed; (v) the failure of the Arresting Officer to introduce a video tape of the Respondent raises an adverse inference against the testimony of the Arresting Officer and (vi) it was error for the Petitioner to rely upon the results of any blood tests because of the lack of foundation for the introduction of such tests.

The Respondent therefore contends that Judge Johnson's Order was not clearly wrong in making these findings and this Honorable Court should reject the Petitioner's Petition for Appeal.

II. STATEMENT OF FACTS

On November 23, 2007, Deputy J. B. Bailey of the Nicholas County Sheriff's Department responded to an accident near Nettie, West Virginia. When Deputy Bailey arrived the Respondent was not at the scene of this accident, but exited a residence some time thereafter.

Deputy Bailey testified, at the administrative hearing on August 6, 2008, that he felt the approximate time of the crash was 2306 hours (11:06 p.m.).

Deputy Bailey testified that after he spoke with the Respondent he smelled alcohol on the Respondent's **person** and then performed three (3) field sobriety tests. (*emphasis added*) Deputy Bailey did not testify that he had been trained to perform these tests or that he smelled alcohol on the Respondent's breath. Deputy Bailey did not testify how these tests were performed, whether he instructed or demonstrated these tests to the Respondent or the specific results of these tests. Deputy

Bailey merely testified that he performed a horizontal gaze nystagmus test, a walk and turn test and a one leg stand test which the Respondent allegedly failed. Deputy Bailey then testified that he performed a preliminary breath test on the Respondent. Deputy Bailey did not testify that he was trained or certified to perform this test. Deputy Bailey did not testify that he waited for fifteen (15) minutes before performing this test as required by the applicable administrative regulations for the administration of a preliminary breath test, *64 CSR 10-5.2(a)* or the National Highway Traffic Safety Administration (NHTSA) Guidelines. There was no other information available to the Petitioner that Deputy Bailey observed the Respondent for fifteen (15) minutes from either the testimony of Deputy Bailey or any documentary evidence before the Petitioner.

Deputy Bailey eventually placed the Respondent into custody for the offense of DUI and transported him to the Nicholas County Courthouse where a secondary chemical test of the Respondent's breath was administered. At the administrative hearing, Deputy Bailey did not testify that he checked the Respondent's mouth prior to the administration of this test nor did he testify that he waited twenty (20) minutes prior to the administration of this test as required by the applicable Code of State Rules, *64 CSR 10-7.2(a)*. Deputy Bailey merely testified that he ran the accused on an Intox EC/IR II which the Respondent failed.

Deputy Bailey then transported the Respondent to the Summersville Memorial Hospital where a blood test was administered.

At the administrative hearing, a representative from Summersville Memorial Hospital appeared and presented records relating to the blood test performed on the Respondent. This representative testified that she did not take the blood in question, did not analyze the blood, did not have anything to do with analyzing the blood and was merely a custodian of the records. (See, *Transcript of Administrative Hearing ("Transcript")*, pgs. 6-7) Counsel for the Respondent

objected to the introduction of these records based upon this representative having no knowledge of the test or how it was performed. In addition, counsel for the Respondent objected on the grounds that a foundation for the introduction of such blood test was not laid pursuant to *W. Va Code §17C-5-6*. Counsel for the Respondent specifically objected on grounds that there was no evidence in the record regarding the training of the people who analyzed the blood or took the blood nor was there any evidence regarding the methodology used to obtain the result. There was no evidence in the record whether the blood tested was whole blood or serum nor was there testimony that any testing was performed by a qualified laboratory or that the person who took the blood was properly qualified. (See, Transcript, pgs. 7-8)

At the administrative hearing the Respondent testified that he was involved in a crash on the night in question and injured the side of his face and “stoved” his leg getting out of the vehicle. (See, Transcript, pg. 18)

The Respondent also testified that prior to the administration of the preliminary breath test he smoked a cigarette within fifteen (15) minutes. The Respondent also testified that he was not under the influence of alcohol at any time on the evening he was arrested. (See, Transcript, pg. 18)

The Respondent also testified that the accident in question occurred between 10:15 and 10:30 in the evening. (See, Transcript. pg. 18) The Respondent confirmed this time by introducing a copy of the tow bill from the towing of his vehicle. (See, Transcript, pgs. 19-20)

The Respondent also testified that during the administration of the horizontal gaze nystagmus test he had his eyeglasses on. (See, Transcript, pg. 16) The Respondent also testified that Deputy Bailey did not demonstrate either the walk and turn test or the one leg stand test. (See, Transcript, pgs. 16-17) The Respondent also testified that the area where he performed these tests consisted of very large gravel and that he was wearing cowboy boots. (See, Transcript, pg. 17) The gravel in the

area where the Respondent performed the walk and turn and the one leg stand tests was approximately two and one-half to three (2 ½ -3") inches long and at least three to three and one-half (3-3 ½") wide. (See, *Transcript*, pg. 20) The Respondent also testified that as a result of performing these tests on large gravel it effected his balance while performing these field sobriety tests. (See, *Transcript*, pg. 23)

The Respondent was initially charged with driving under the influence of alcohol in the Magistrate Court of Nicholas County. This charge was dismissed.

After the administrative hearing, the Petitioner entered a Final Order which did not comply with the mandates of *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E. 2d 518 (1996) and *Choma v. West Virginia DMV*, 210 W. Va. 256, 667 S.E. 2d 310 (2001). The Petitioner agreed that this Order did not comply with the requirements set forth by this Honorable Court and agreed that the matter should be remanded in order to address the deficiencies in the initial Final Order.

Thereafter the Petitioner entered a Remand Final Order. The Respondent filed a timely Petition for Judicial Review and Judge Johnson entered the Order from which the Petitioner appeals.

III. ARGUMENT

A. THE CIRCUIT COURT WAS NOT CLEARLY WRONG IN EXCLUDING THE RESULTS OF AN INTOXIMETER TEST.

The Petitioner erroneously asserts that Judge Johnson was incorrect in finding that the results of the secondary chemical test of the breath were improperly admitted because this test was not conducted within two (2) hours from and after the time of arrest.

W. Va. Code §17C-5-8(a) provides, in pertinent part, that... "evidence the amount of alcohol in a person's blood at the time of the arrest or the acts alleged, is shown by a chemical analysis, his

or her blood, breath or urine is admissible, if the sample or specimen was taken within two (2) hours from and after the time of arrest or **the acts alleged**" (*emphasis added*).

The clear meaning of this statute requires that a sample of a person's blood, breath or urine be taken within two (2) hours from and after the acts for which he is charged. Although this statute uses the word "or", the relevant time, in this case, is when the Respondent last drove a motor vehicle. A critical element of an offense under W.Va. Code §17C-5-2 is "driving". Consequently, since the undisputed evidence presented at the administrative hearing was that the secondary chemical test of the Respondent's breath was conducted more than two (2) hours after the time he last drove, Judge Johnson was correct in finding that the Petitioner erroneously relied upon this test result as *prima facie* evidence that the Respondent was driving a vehicle under the influence of alcohol. The Petitioner used the actual numeric result of this breath test to conclude that the Respondent drove a motor vehicle while under the influence of alcohol. To find that the operative time to begin the subject two (2) hour limit is the time of arrest, as opposed to the time of the act(s) alleged, bears no rational relationship to whether the person charged violated a statute which requires a person to drive a vehicle as a fundamental element of the offense. It is quite easy to envision a situation when a person is not arrested for hours after he or she last drove a vehicle. The subject's blood alcohol could be increasing or decreasing during this period, depending on when he or she last consumed an alcoholic beverage. Therefore, the Petitioner clearly erred in relying upon this evidence and Judge Johnson was correct in his finding and conclusion regarding this test.

The Petitioner relies upon State v. Dyer, 355 S.E.2d 356, 362 (1987) to argue that he was not wrong in relying upon this evidence. However, the Petitioner ignores the fact that he used the result of this test as *prima facie* evidence of intoxication when this Honorable Court found that reliance

upon the result of this test as *prima facie* evidence was error when the test did not comply with the relevant statutory requirements.

The Respondent contends that W.Va Code §17-5-8 is a penal statute and as such must be strictly construed in favor of the Defendant. *State v. McCraine*, 558 S.E.2d 177 (2003) Judge Johnson was therefore entirely correct in finding that the breath test result was not properly admissible and the use of the result of such test as *prima facie* evidence of intoxication was improper.

The Petitioner has therefore set forth insufficient grounds for this Honorable Court to reverse Judge Johnson's Order and this portion of his Order should be affirmed.

**B. EVIDENCE OF THE RESPONDENT'S BLOOD TEST RESULTS
WERE NOT PROPERLY ADMITTED INTO EVIDENCE
AND RELIED UPON BY THE PETITIONER**

Judge Johnson was also entirely correct in finding that the results of any blood tests performed on the Petitioner were not properly admissible based upon the evidence in the case and to rely upon such test result was an error by the Petitioner.

The subject blood test was performed approximately four (4) hours after the alleged offense the Respondent had been arrested before this test was performed and there was no foundation laid for the introduction of this test.

The Petitioner allowed the results of the subject blood test to be introduced at the administrative hearing with no foundation whatsoever. The records custodian from Summersville Memorial Hospital was the only person to testify regarding this test. This representative had no knowledge of when the test was conducted, how it was conducted, who conducted the test, who drew the blood, whether the blood tested was whole blood or serum or whether the laboratory which

analyzed the blood was properly qualified. Consequently, under W.Va. Code §17C-5-6 the result of this test was clearly inadmissible.

In addition, this blood test was not taken within two (2) hours from and after the time of the acts alleged, to-wit: driving a motor vehicle. Thus, W.Va. Code §17-5-8 prohibits the introduction of the result of this test and it was a clear error for the Petitioner to rely upon the result of this test to conclude that the Respondent drove a vehicle while under the influence of alcohol.

The Respondent admitted the results of this test, in part, because he asserted that the Respondent had not challenged the results of this test. This was also clear error and was contrary to the record. Counsel for the Respondent advised the Petitioner, in the Hearing Request Form provided to the him, and in a letter to the Petitioner, that the Respondent intended to challenge the results of any secondary chemical test. Consequently, the Respondent complied with the applicable statutes and regulations regarding notification to the Petitioner that he intended to challenge the results of a secondary chemical test. Therefore, the Petitioner erred in relying upon the alleged failure of the Respondent to challenge this blood test to result when he relied upon this test in his Final Order and Remand Final Order.

The Respondent relies upon Lowe v. Cicchirillo, 223 W.Va. 175, 672 S.E.2d, 311 (2008) to justify the introduction of the blood test result in this case with no foundation. This reliance is clearly misplaced. In *Lowe*, the blood test result was submitted with the initial Statement of Arresting Officer. As such, this Honorable Court found that this test was admissible for limited purposes. In this action, the Respondent properly challenged the results of this test and because of the total lack of foundation, Judge Johnson was correct in finding that the Petitioner erroneously relied upon this test to conclude that the Respondent drove a motor vehicle while under the influence of alcohol.

The Petitioner, in this case, incorrectly relied not only on the results of the preliminary breath test and the secondary chemical test of the breath, but also upon the blood test results to conclude that the Respondent drove a vehicle while under the influence of alcohol. (See, pg. 8 of Remand Final Order, Exhibit "A")

This Honorable Court should therefore refuse the Petitioner's Petition for Appeal on these grounds.

**C. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT THE
TESTIMONY OF THE ARRESTING OFFICER AND
THE DRIVER WERE NOT RECONCILED**

The Petitioner erroneously argues that the Discussion section in his Remand Final Order complied with the mandates of *Muscatell* and *Choma, supra*. A careful review of this section however shows that even though this matter was specifically remanded by Judge Johnson, based upon an agreement between the Petitioner and the Respondent, to comply with *Muscatell* and *Choma, supra*, the Petitioner's Remand Final Order fails to discuss various elements of the inconsistencies between the testimony of the Arresting Officer and that of the Petitioner. For example, the Respondent testified that the area where he performed a one leg stand and walk and turn test consisted of only very large gravel which effected his balance. The Respondent's reconciliation of this evidence was to find that "even though there may have been gravel in the area there is insufficient evidence to show that the Respondent performed the field sobriety tests in the area comprised of nothing but large gravel." The testimony of the Respondent was that he performed both of these field sobriety tests in an area which was comprised of nothing but very large gravel. This evidence was not rebutted by the Arresting Officer, however, the Petitioner chose to ignore this undisputed evidence. In addition, the Respondent testified that he smoked a cigarette within fifteen (15) minutes prior to the administration of the preliminary breath test. Thus, the result of this test

was not admissible pursuant to 64 CSR 5.2(a) This evidence was really not disputed by the Arresting Officer. The Petitioner, nevertheless, relied upon the result of the preliminary breath test, in part, to conclude that the Respondent drove a motor vehicle while under the influence of alcohol. In addition, there was no evidence before the Petitioner that Deputy Bailey observed the Respondent for fifteen (15) minutes prior to the administration of this test. Deputy Bailey did not testify to this observation and the documentary evidence before the Petitioner did not contain evidence of this observation period. This was clear error by the Petitioner and a failure to comply with the mandate of *Muscatell, supra*.

There was also evidence before the Petitioner that the criminal case against the Respondent had been dismissed. The Petitioner chose not to give substantial weight to this dismissal, contrary to *Choma, supra*, by placing the burden on the Respondent to show why the charges were dismissed when he found that “evidence was not presented by the **Respondent** regarding the charges to which he agreed to plead guilty in exchange for the DUI charges to be dismissed.” (emphasis added) This improper shifting of the burden to the Respondent to explain the basis for the dismissal of the criminal charges against him for driving under the influence of alcohol was another example of the clear error committed by the Petitioner in his Remand Final Order and justified Judge Johnson’s findings and conclusions.

This Honorable Court should therefore affirm this portion of Judge Johnson’s Order which reversed the Petitioner’s Remand Final Order.

**D. THE CIRCUIT COURT DID NOT ERR IN FINDING THAT
THE FAILURE OF THE ARRESTING OFFICER TO
PRODUCE A VIDEO TAPE RAISES AN ADVERSE
INFERENCE THAT SUCH VIDEO TAPE WOULD
BE ADVERSE TO THE TESTIMONY OF THE OFFICER**

The Petitioner argues that the only indication that a video tape was made of the Respondent while administering a breath test was in the Statement of the Arresting Officer, yet the Petitioner wants to rely upon the Statement of Arresting Officer to provide much of the evidence which it used to conclude that the Respondent drove a vehicle while under the influence of alcohol. It was, nevertheless, undisputed that a video tape was made of the Respondent and the Arresting Officer failed to introduce this video tape at the administrative hearing.

The Petitioner has consistently argued, and this Honorable Court has held, that a driver's license revocation proceedings are civil in nature. Thus, the failure of a party, in this case Deputy Bailey, to present relevant and material evidence in a civil proceeding may give rise to an adverse inference that such failure would have been adverse to the party failing to present such evidence which he had in his possession. In *McGlone v. Superior Trucking Company, Inc.*, 178 W.Va. 659, 363, S.E.2d, 736 (1987), this Honorable court held that the unjustified failure of a party in a civil case to call an available material witness may, if the trial of the facts so finds, gave rise to an inference that the testimony of the "missing" witness would, if he or she had been called, had been adverse to the party failing to call such witness. In the present case, Judge Johnson was totally justified in drawing this adverse inference considering that the evidence that this video tape was made and was not presented by Deputy Bailey.

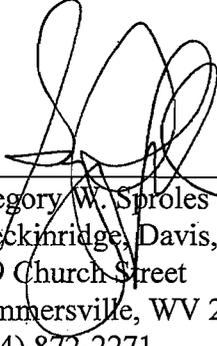
In any event, this finding by Judge Johnson was not set forth in his Conclusions of Law and was not the main basis for Judge Johnson's reversal of the Petitioner's Remand Final Order.

This Honorable Court should therefore affirm this portion of Judge Johnson's Order which reversed the Petitioner's Remand Final Order.

IV. CONCLUSION

The Petitioner has failed to set forth a sufficient basis to reverse Judge Johnson's well reasoned and articulate Order which reversed the Petitioner's Remand Final Order. Consequently, this Honorable Court should affirm Judge Johnson's Order which reversed the Petitioner's Remand Final Order and grant the Petitioner/Appellee such other and general relief that it may deem proper.

Respectfully submitted,
EDWARD L. SIMS, II
By Counsel,



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West Virginia Division of Motor Vehicles,

Appellant/Respondent Below.

CERTIFICATE OF SERVICE

I, Gregory W. Sproles, counsel for Respondent/Petitioner Below, Edward L. Sims, II, do hereby certify that I have served the foregoing *Response of Appellee/Petitioner Below, Edward L. Sims, II, to Brief of Appellant/Respondent Below*, upon the plaintiff by mailing a true copy, by United States Mail, postage prepaid on this the 16th day of November, 2010 and properly addressed as follows:

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